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White Collar Roundup - March 2017

Does a Guilty Plea End Any Constitutional Challenges?

The U.S. Supreme Court will consider in *Class v. United States* "[w]hether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction." The case involves Rodney Class, who is a retired veteran residing in North Carolina. Class traveled to Washington, D.C., in May 2013 and "left his lawfully-owned firearms secured out-of-sight in bags inside his locked vehicle," which he parked in a public lot about 1,000 feet from the U.S. Capitol. Class didn't know the lot was part of the "Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. 5104(e)." When Class was away from his vehicle, a police officer saw in the cab of the vehicle what she mistakenly believed was a gun holster. When Class returned, he was arrested and his vehicle was searched. The firearms were discovered, and Class was charged with violating §5104(e). Class raised several challenges to §5104(e), including under the Second Amendme??nt and due process clause. The district court denied those claims, and Class pleaded guilty. Class then appealed to the U.S. Court of Appeals for the D.C. Circuit, claiming §5104(e) violated the Second Amendment and due process by failing to identify what comprises "Capitol Grounds." The court affirmed his conviction, holding that by pleading guilty, Class inherently had waived his constitutional claims. Because there is a circuit split on this issue, Class petitioned for a writ of certiorari, which was granted. To review the petition, click here.

Third Circuit Makes the Crime-Fraud Exception a Bit Tighter

The Third Circuit in *In re Grand Jury Matter #3* narrowed the scope of the crime-fraud exception to the attorney work-product doctrine. The case involved, among others, Company A, John Doe and his lawyer. All of them were the subjects of an ongoing grand jury investigation into an allegedly fraudulent business scheme, which involved a purported sham sale of Company A, which Doe controlled. After the transaction, Company A and Doe were involved in litigation. During the course of the investigation, the government obtained an e-mail, which Doe claimed was protected by the attorney work-product doctrine. The e-mail included advice from Doe's lawyer, which Doe forwarded to his accountant, that referenced an ongoing litigation, and suggested Doe could amend his tax returns to gain an advantage in the litigation. The government sought and obtained permission from the district court to present the e-mail to the grand jury. The district court concluded the e?mail was protected by the work-product doctrine but was in furtherance of a crime, so the crime-fraud exception applied. Doe appealed. The crime-fraud exception allows the disclosure of otherwise confidential communications when the party looking to disclose the document shows there is a "reasonable basis" to suspect (1) that the lawyer or client "was committing or intending to commit a crime or fraud" and (2) that the "attorney work product was used in furtherance of that alleged crime or fraud." The Third Circuit noted that in this case, Doe forwarded his lawyer's e-mail to his accountant but never amended his returns. He "at most thought about using his lawyer's work product in furtherance of a fraud, but he never actually did so." By so holding, the Third Circuit tightened the crime-fraud analysis by requiring that the movant show the defendant ultimately used the allegedly protected advice, not simply that he received it and shared it with others.

Neither Negligence nor Intentional Disregard Constitutes a Defense to Fraud

In *United States v. Lindsey*, the Ninth Circuit held that neither negligence nor intentional disregard by lenders is a defense in a prosecution for a mortgage-fraud scheme. Nicholas Lindsey was a mortgage loan officer and real estate broker who was convicted of wire fraud. Lindsey was involved in a scheme in which he would convince people to "buy" residential properties in exchange for financial assistance. Lindsey would build up their credit rating and deposit money into their accounts to obtain mortgages. He also falsified loan documents to make the borrowers appear more creditworthy and falsely stated their income. The goal was to obtain mortgages and then put the properties into foreclosure, garnering profits for Lindsey and

losses for the lenders. Lindsey was indicted for wire fraud. At trial, "the district court precluded Lindsey from presenting certain evidence regarding the practices of particular lenders," related to the review of information on borrowers. On appeal, the Ninth Circuit held "that lender negligence in disregard of the information is not a defense to fraud, and so evidence of such negligence or intentional disregard by particular lenders is inadmissible as a defense against charges of mortgage fraud."

Sentence. Appeal. Remand. Sentence. Appeal. Remand.

In the second appeal of his sentence, Thomas Evans in *United States v. Evans* again got relief from the Tenth Circuit. The case arose from the sentence imposed after Evans pleaded guilty to conspiracy to commit mail and wire fraud. Evans had been the owner of a real estate development firm in Colorado. In his development efforts, he sold interests in certain limited partnerships. Unfortunately, he ran into some cash flow problems and provided false reports to investors and lenders. At his first sentencing, the district court calculated the losses attributable to his fraud at $12.3 million, concluded he victimized between 50 and 249 victims, and sentenced him to 14 years in prison. He appealed, and the Tenth Circuit "required the district court to recalculate the losses caused by the fraud and reconsider how the amount of the losses would affect the sentence." The district court did so, recalculating the losses at slightly over $4 million, and applied a four-level enhancement because of the existence of 50-249 victims. It then sentenced Evans to prison for a term of 121 months. In the second appeal, the Circuit concluded the district court had not followed its instructions from the first appeal and improperly calculated the losses and applied the enhancement. The Tenth Circuit vacated the sentence and remanded to the district court. While noting that the judge was not personally biased and did not act improperly, the Circuit also assigned the case to a new district judge. It reached this conclusion because in the initial remand, the judge expressed her view that the defendant had "stole[n]" $12 million, even though she concluded the losses were only $4 million. It also noted that "reassignment would preserve the appearance of justice" by avoiding a third sentencing by the same district judge for the same offense. And speaking of changing judges, Judge Neil Gorsuch heard oral argument for the panel, but, perhaps because of recent events, did not participate in the order.

SEC Gives Up on Retroactive Bars

As we reported here and here, the D.C. Circuit has vacated U.S. Securities and Exchange Commission orders that relate to conduct predating the Dodd-Frank Act but impose collateral bars authorized by that law. Specifically, in *Bartko v. SEC*, the D.C. Circuit held that the agency overstepped its authority by imposing a collateral bar on Gregory Bartko because that sanction was authorized after Bartko had engaged in the offending conduct. In a statement, the commission announced its determination "not to seek further review of that decision." It also invited individuals who are "the subject[s] of a Commission order imposing a collateral bar from associating in any capacity in the securities industry" for conduct that occurred before July 22, 2010 (Dodd-Frank's effective date), to "request that the Commission issue an order vacating the bar(s)," by completing a form available here. To temper that good news to affected parties, the statement notes, "This process applies only to collateral bars, which are bars that prohibit you from associating in a capacity in the securities industry with which you were not associated or were not attempting to associate at the time of your securities law violations." Moreover, it also warns that even if a collateral bar is vacated, any other lawfully imposed bars will remain in place.

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